INDEX

	Page
Questions Presented	1
Reasons for Granting the Writ	2
Point 1	2
Point 2	4
Point 3	4
Point 4	6
Conclusion	7

CITATIONS

Cases:

Burge v. Commissioner (4 Cir., 1958) 253 F. 2d 765 3
Fisher v. Macomber (1920) 252 U.S. 189, 64 L. ed. 521 4
Glickman v. Commissioner (2 Cir., 1958) 256 F. 2d 108, 111 3
Jacobson v. Commissioner, 281 F. 2d 703 2, 3
Koshland v. Helvering (1936) 298 U.S. 441, 80 L. ed. 1268 3
Spangler v. Commissioner, 4 Cir. 1960) 278 F. 2d 665, cert. den., Oct. 10, 1960 3

Statutes:

Internal Revenue Code of 1939:
Sec. 115(d) (26 U.S.C. (1952 ed.) 115(d)) 4, 5
Sec. 117(m) (26 U.S.C. (1952 ed.) 117(m)) 2, 5
Internal Revenue Code of 1954:
Sec. 312(f) (26 U.S.C. 312(f)) 6
Sec. 341 (26 U.S.C. 341) 6

Miscellaneous:

H. Rep. No. 2319, 81st Cong., 2d Sess. (1950) 2 Cum. Bull. 380) 4, 5
S. Rep. No. 2375, 81st Cong., 2d Sess. (1950) 2 Cum. Bull. 483) 4, 5
S. Rep. No. 1622, 83d Cong., 2d Sess. (3 U.S.C. Cong. & Adm. News (1954) 4621) 6
Treasury Regulations 111, Sec. 29.117-11 4, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 453

H. A. BRYAN AND RUBY M. BRYAN, C. B. McNAIRY AND ROWENA A. McNAIRY, W. H. WEAVER AND EDITH H. WEAVER, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Pursuant to Rule 24, the petitioners deem it important to reply briefly to respondent's brief in opposition to their petition for a writ of certiorari.

QUESTION PRESENTED

At page 2 of respondent's brief, under the above caption, there appears the issue between the parties. The questions presented by that issue are not stated

tween taxable stock dividends and non-taxable stock dividends for a period of over fifteen years after the decision in *Eisner* v. *Macomber* (1920) 252 U.S. 189, 64 L ed 521, notwithstanding this Court had pointed out such distinctions (298 U.S. at p. 445, 80 L ed at p. 1272, footnote 8). The Commissioner should have at least as much interest as does any taxpayer in clarifying the law which has resulted in conflict between the Circuits.

Point 2

Under this point of respondent's brief (p. 7) he attempts to cover Points 2 and 3 of the petition but fails to answer convincingly either of them. The cases cited by respondent manifest a complete disregard of the congressional intent that, for the purpose of determining the applicability of Section 117(m), the sales or exchanges of stock should be *to outside interests*, also that the "distributions" be limited to distributions *of property*. (H.R. 2319, 81st Cong., 2d Sess. (Pet. App. 32a, 35a); S.R. 2375, 81st Cong., 2d Sess. (Pet. App. 39a, 41a)).

Point 3

Under this point of argument, respondent's brief in opposition (p. 8) purportedly answers the latter portion of petitioners' Point 3 and all of Point 4. It first asserts that the Treasury Regulations 111, Sec. 29.117-11, "are in complete harmony with the broad provisions of Section 117(m), and their legislative history." (p. 8), and, secondly, that "the Committee Reports point out that Section 117(m) was intended to govern distributions which previously were taxable as capital gains under Section 115(d)." (p. 9)

The regulations in question appear in the appendix to respondent's brief at pages 13-27. Under subpara-

graph (a) thereof (p. 13), a distribution under Section 115(d) is not confined to a distribution of property; instead it purports to apply to *all* distributions. The regulations clearly go beyond the plain intendment of Section 117(m) in extending "distributions" under Section 115(d) to include cash distributions.

Lest there be any doubt on that score, Example 1 of the regulations (Resp. App. 23-24) goes so far as to treat as a collapsible corporation transaction the distribution of excess proceeds of an F.H.A.-insured loan, without any reference to a sale or exchange of stock, a liquidation, or a distribution of property. And, that example has been freely accepted as a regulation in harmony with the law in the cases relied upon by the respondent. The Committee Reports specifically confine to a distribution *in property*, the portion of Section 115(d) which is incorporated by reference into Section 117(m), leaving other distributions under 115(d), including cash distributions, unaffected.

"COLLAPSIBLE CORPORATIONS. (a) In General.—With respect to taxable years ending after December 31, 1949, the entire gain from . . . (3) a distribution made by a collapsible corporation which, under section 115(d), is treated, to the extent it exceeds the basis of the stock, in the same manner as a gain from the sale or exchange of property, shall be considered as gain from the sale or exchange of property which is not a capital asset. . . .

"In like manner, the corporation might distribute the *property in question* without liquidating and, under section 115(d), the *excess of the property* distributed, to the extent that it was not a dividend, would first be applied against the adjusted basis of the stock to the shareholders and the *excess*, if any, would be taxable in the same manner as a gain from the sale or exchange of property. Paragraph (1) of the subsection, in prescribing the method to be given the gain from the sale or exchange of stock of a collapsible corporation, is deemed to refer to *this excess value* in the case of a distribution made by the corporation other than in liquidation." (Emphasis supplied.) (Pet. App. 35a, 41a)

Poinf 4

Under this point of argument (Bf. p. 9) the respondent takes issue with petitioners' Point 4 (Pet. Bf. pp. 28-30). He cites S. Rep. No. 1622, 83rd Cong. 2d Sess. p. 260 (3 U.S.C. Cong. & Adm. News (1954 4621, 4898). That report, to the extent that it relates to Sections 312(j) and 341 of the 1954 Code, appears in petitioners' Appendix pp. 45a-49a.

There can be no doubt that Section 312(j) of the 1954 Code had no counterpart in the 1939 Code. Yet, Example 1 of the Commissioner's Regulations under the 1939 Code bears something more than a remote relationship to the subject matter of Section 312(j).

Dealing with Section 341, Collapsible Corporations, the Senate Report states (Pet. App. 49a):

> Subsection (a)(3) incorporates a rule of present regulations that would include gain from a distribution made by a collapsible corporation. . . . This provision would apply, for example, in the case of a corporation engaged in building, and otherwise meeting the tests of a collapsible corporation, which distributes the proceeds of a loan in excess of the adjusted basis of the property by which the loan is secured.[3]

Does not this language of the Senate Finance Committee fully sustain Point 4 of the petition for a writ of certiorari? And, does it not further suggest that Example 1 of the Regulations under the 1939 Code lacked support in the law?

[3] The Senate Finance Committee was not passing upon the validity or invalidity of the regulations,—a judicial function and not a legislative one. It merely stated a fact.

CONCLUSION

It is respectfully submitted that the respondent's opposition to the petition for a writ of certiorari in the instant cases is not well taken.

STANLEY WORTH
404 Transportation Building
Washington 6, D. C.

CLAUDE C. PIERCE
440 West Market Street
Greensboro, North Carolina

EDWARD S. SMITH
404 Transportation Building
Washington 6, D. C.

Counsel for Petitioners

Of Counsel:

BLAIR, KORNER, DOYLE & WORTH
404 Transportation Building
Washington 6, D. C.

MCLENDON, BRIM, HOLDERNESS, & BROOKS
440 West Market Street
Greensboro, North Carolina